82-1561

SUPREME COURT CASE NUMBER:

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM

Paul W. Cousino, Plaintiff-Petitioner

v.

SONIA J. STAIR, personal representative of the estate of HUNTER D. STAIR, Defendant;

WILLIAM J. McGRAIL, Jr., Defendant;

and,

WILLIAM J. McGRAIL, Jr., P.C. (incorporated under the laws of the State of Michigan, Defendant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL W. COUSINO, in propria persona
43150 Charlemagne
Sterling Heights, Mich.
48078
(313) 731-0674

QUESTIONS PRESENTED FOR REVIEW

WAS STAIR'S MOTION TO DISMISS PROPERLY BEFORE THE DISTRICT COURT? (procedural)

THE CONSTITUTIONAL QUESTION (HOW WAS THE CONSTITUTION VIOLATED?

JUDICIAL IMMUNITY AS APPLIED TO MINISTERIAL ACTS. (DOES IMMUNITY APPLY HERE?)

A FEDERAL COURT CANNOT IGNORE THE ESTABLISHED LINE OF STATE COURT DECISIONS.

STAIR'S STATE COURT JURISDICTION. (DID HE HAVE THE SAME?)

APPLICATION OF JUDICIAL IMMUNITY TO GOVERNMENT ATTORNEYS (PROSECUTORIAL IMMUNITY).

JUDICIAL IMMUNITY APPLIED TO INJUNCTIVE AND OTHER RELIEF.

SUMMARY JUDGMENT FOR THE PLAINTIFF.

COLOR OF LAW

DEPRIVATION OF A FEDERALLY SECURED RIGHT

DEPRIVATION UNDER 42 USC 1985

CONSPIRACY

MALICE

ANIMUS

PARTIES

PAUL M. COUSINO, Plaintiff-appellant-petitioner

SONIA J. STAIR, personal representative of the estate of HUNTER D. STAIR, Defendant

WILLIAM J. McGRAIL, Jr.

WILLIAM J. McGRAIL, Jr., P.C. (incorporated under the laws of the State of Michigan, Defendant

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TABLE OF AUTHORITIES

REFERENCE TO DECISIONS BELOW

The relevent decisions below are in the appendix, at the end of this document. People v. Cousino appears at 81 Mich App 416 (1978), and is a traffic ticket case (a criminal case at that time in Michigan).

GROUNDS

The judgment of the Court of Appeals for the sixth circuit was entered on Dec. 9, 1982. The case arises under 42 USC 1983 & 1985.

CONSTITUTIONAL PROVISIONS

Amendment 5 and Amendment 14 are at issue.

ISSUES

Plaintiff maintains that the motion to dismiss in District Court, brought on behalf of Defendant STAIR, was not properly before the Court. Plaintiff maintains that it was improper to dismiss the Complaint against a defendant State Court Judge on the grounds of judicial immunity since the constitutional violation performed by the defendant was performed when in a ministerial capacity rather than a judicial capacity; since the jurisdiction of the defendant in State Court was questionable; and, since there was other relief sought below besides monetary damages. Plaintiff maintains that it was improper to dismiss the Complaint against defendant McGRAIL (& his Professional Corporation) on the basis of prosecutorial immunity. Plaintiff maintains that it was improper to deny an injunction to protect the plaintiff from vindictive defendant McGRAIL. Plaintiff

further maintains that Summary Judgment should have been granted to plaintiff.

STATEMENT OF THE CASE

The complaint herein arose out of a traffic ticket heard in the Michigan Court system. Upon appeal from a conviction of 40 mph in a 25 mph zone, the appeal was heard by then county judge STAIR, defendant-appellee herein. Judge STAIR upheld the conviction below. Then STAIR taxed actual attorney's fees as costs.

It is the view of the plaintiff that STAIR went out of his way to "get" the plaintiff herein by taxing such costs, in order to punish previous appeals and prevent the appeal of the traffic ticket to higher courts. Another defendant below, McGRAIL (the traffic ticket prosecutor), in fact, attempted to use the cost award as leverage to prevent further appeal. The plaintiff strongly believes that STAIR knew he would be over-turned on appeal. He knew he was wrong; but, he went ahead because he knew it would cause the plaintiff inconvenience and expense to get him reversed. He had to know that he was wrong. This costs question is very basic law. The plaintiff below knew he couldn't do it. The court clerk knew it was wrong. This costs question is so basic that even newspaper reporters covering the case knew he was wrong.

Those people are not learned lawyers. Yet, STAIR was a learned lawyer, and a State Court judge. He couldn't be that ignorant.

Upon further appeal, the Michigan Court of Appeals upheld the traffic court conviction; but, in very strong language said court held that the cost award violated the constitutional rights of the Plaintiff-Appellant herein, and they reversed said award. (See People v. Cousino, 81 Mich App 416, 1978, Appendix page i)

The traffic ticket per se continued its appeal to the U.S. Supreme Court.

The question here is whether or not STAIR could abuse his position for the detriment of his victim without fear of punishment.

The Michigan Court of Appeals has held that STAIR had, "impermissibly threaten(ed) defendant's (Cousino's) right to appeal"; that there was a constitutional right to appeal, and that STAIR's actions "constitute(d) an attempt to chill exercise of the right to appeal". Noting that the federal courts had also held repeatedly that it was a U.S. Constitutional violation to chill the right to appeal, the plaintiff brought suit, naming defendant's STAIR and McGRAIL under 42 USC 1983 & 1985, and charging both color of law and conspiracy.

The only defense available to the defendant's was immunity. However, the Michigan courts, as will be presently shown, have held consistently that taxing costs (which was the constitutional violation) is a ministerial rather than a judicial act. The federal courts are bound by this interpretation, and the U.S. Supreme Court has repeatedly held that ministerial acts are not covered by immunity. Further, an effort to obtain other relief, such as injunctive relief, does not encounter the immunity obstacle.

Nonetheless, the District Court dismissed the complaint by reason of judicial immunity. (See Appendix) Plaintiff appeals.

(It must further be noted, parenthetically, that the cost award which is the subject matter of the within suit is merely one carefully planned aspect of a campaign of harassment and vindictiveness launched by the defendant-appellee judge against appellant and designed to punish exercise of the right to appeal and the right to appear without counsel. In fact, the dismissal in District Court merely served to encourage the aforementioned harassment. Another incident of this harassment was launched on Dec. 29, 1978, when said defendant

got the Friend of the Court to pretend to act "on behalf of Carolyn Cousino" in a fraudulent fashion, and take action against the appellant. Carolyn Cousino, appellant's ex-wife immediately upon receipt of a notice that such action was pending, called appellant to tell him that she had been sent such a notice; that she was not aware of the nature of the proceeding, since she was not in receipt of anything other than a notice; that she had not instigated the proceeding; that it was apparently an act of vengeance launched by the judge and that she wanted no part of anything that corrupt; and that she would call the Friend of the Court to tell him the same. She did so. The appellant later called the Friend of the Court and was told that, since the judge was involved in the matter, the Friend of the Court would proceed, even against the wishes of the appellant and the appellant's ex-wife. Ultimately, after two such incidents and the death of STAIR, appellant and his ex-wife were able to exclude the Friend of the Court from further action, of any sort, in the case. This is another illustration of the harassment to which the appellant has been subjected.)

After dismissal of STAIR the case was prematurely taken to the Court of Appeals, which remanded until final judgment.

On Dec. 6, 1979, defendant STAIR died. Pursuant to a Suggestion of Death on the Record and a Motion for Defendant Substitution, on April 23, 1980, STAIR's estate (SONIA J. STAIR, personal representative) was substituted as the defendant.

On Dec. 4, 1980, defendant McGRAIL was held not liable for damages by reason of prosecutorial immunity. Plaintiff appeals.

On August 31, 1981, defendant McGRAIL was held not enjoinable (an injunction had been sought to prevent further future infractions). Plaintiff appeals.

The final judgment in District Court was entered on September 14, 1981. The Court of Appeals upheld the District Court on Dec. 9, 1982.

The various Court Orders, etc. are shown in the appendix hereto.

ARGUMENT

WAS STAIR'S MOTION TO DISMISS PROPERLY BEFORE THE DISTRICT COURT?

Defendant's previous counsel, LOVELL, was admitted to practice before the District

Court on April 23, 1978. Nonetheless, he has displayed a constant disregard for local court rules.

Local Court Rule 9(a) provides that counsel LOVELL must request concurrence of the opposition with a motion prior to filing. He did not do so. (It should be noted that he is not relieved from this obligation if he anticipates opposition to the motion; in fact, those are precisely the types of motions that the rule envisions.) And, he must state in his motion itself that such concurrence was sought and not granted. Counsel failed to comply. Under Local Court Rule 27 this is a failure to prepare for trial and justifies default on the entire case.

The court rule violation was brought to the attention of counsel LOVELL on three separate occasions, yet in continuous communication with the plaintiff he failed to comply, and stated in his pleadings and in open court that he had not complied with the court's rules. He did not show good faith.

Another violation of the court's rules took place when LOVELL filed his BRIEF IN REPLY TO ANSWER TO MOTION TO DISMISS, which was filed on Thursday, with the plaintiff receiving a copy on Friday, with a hearing to be held on Tuesday. Local Rule 9 talks about

a motion and a response; but not about a reply to an answer. In fact rule 9(h) says that supporting documents and briefs can be filed later when the court has enlarged the time; however, no ex-parte order so enlarging the time was served on the plaintiff or filed in court. The document couldn't be a new motion, since it was not titled as such, and since it would require 10 days service before the hearing, as per local rule 9(j). The FRCP, rule 15, allow amendments, but only within 20 days, which had expired; unless the court grants leave, in which case the plaintiff would be allowed 10 days to reply to the amendment (the court did not grant leave). But, the court would have had difficulty in granting leave to file supplemental pleadings, since FRCP 15(d) says that the court can grant leave to file such supplemental pleadings only when the document is "setting forth transactions or occurrences or events which have happened since the date of the pleading"; and nothing new had happened. In fact, the Pocket Part for 1978 to Title 28, Rules 1 - 11 has a Lawyer's Time Table at page 26 which says, about a "Reply to answer", "only if ordered by court". FRCP 7, entitled "Pleadings Allowed; Form of Motions", says nothing about such a reply to an answer. FRCP 12 was the rule under which LOVELL was proceeding with his motion. And,

sections (g) and (h) of that rule make no provision for successive motions when counsel decides his grounds aren't good enough and starts to panic. But, the rule does say that anything not set forth in the original pleading is waived. FRCP 6(b) does not permit untimely acts which are the result of culpable negligence. Under FRCP 12(f), plaintiff offered a motion orally to the court to strike the entire pleading. A motion had already been offered to the court to disregard the motion to dismiss for court rule non-compliance. Neither the Motion to Dismiss, nor the Reply to Answer were properly before the Court. The Motion to Dismiss was filed with disregard for rule 9, and that disregard went un-corrected, as explained above. The Reply to Answer was totally outside the rules. What is the point in the court generating court rules to regulate practice before the court, when attorney's flagrantly disregard them. As long as the court permits this flagrant disregard, attorneys will not comply with the courts rules.

As can be readily seen, the District Court proceeding was highly irregular.

THE CONSTITUTIONAL VIOLATION.

The Michigan Court of Appeals, People v. Cousino, appendix pages i through v, has held that STAIR violated COUSINO's constitutional rights, by actions that "constituted an attempt to chill the exercise of the right to appeal".

Further, the U.S. Constitution, Amendment 5, guarantees due process in criminal proceedings. This is enforceable to the states through the 14th Amendment; see North Carolina v. Pearce, 395 US 711, 1969, which also held that a state trial court cannot punish an appeal, at page 723 - 724. The court said, therein, that, "penalizing those who choose to exercise" the right to appeal "would be patently unconstitutional". And the very threat inherent in the existence of such a punitive policy would serve to "chill the exercise of basic constitutional rights". The Court goes on to say, "the imposition of a penalty upon the defendant for having successfully pursued a statutory appeal or collateral remedy would be no less a violation of due process of law", and, further, "A court is without right to ... put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered." The Court goes on, "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The High Court cites numerous cases in support of this view and goes on to further state that such retaliation, or the apprehension of it, is a due process violation.

The same was held at Boykin v. Huff, 121 F2d 865, 1941 (D.C.); and U.S. v. Fiore, 467 F2d 86, 1972 (2nd Circuit); Diblin v. Follette, 413 F2d.408, 1969 (2nd Circuit); Griffin v. Illinois, 351 US 12, 1955; Douglas v. California, 372 US 353, 1963; and Dowd, Warden v. U.S. ex rel Cook, 340 US 206, 1951; Cochran v. Kansas, 316 US 255, 1942; People v. Payne, 386 Mich 84, 1971; and People v. McMiller, 389 Mich 425, 1973.

There is no question that STAIR acted under color of law. (See Picking v. Pennsylvania R., 151 F2d 240, 1945.) STAIR and McGRAIL, acting together, constituted a conspiracy.

But, STAIR's attorney did not contest any of this below.

JUDICIAL IMMUNITY AS APPLIED TO MINISTERIAL ACTS.

The contest below was on the question of immunity.

Plaintiff accepts the doctrine of judicial immunity without arguing against it per se, seeking only to define the limits of such immunity. 14 CJS Supp pg 221 (sec. 136) says that, "However, the privilege of absolute

immunity is to be applied sparingly in suits brought under the (Civil Rights) Act..."

When a State Court judge violates the federally secured rights of a litigant who comes before him, and when the violation is a ministerial act, rather than a judicial act, immunity does not apply.

The main-stream of the decisions on judicial immunity have held that a judge has no immunity in non-judicial (i.e., ministerial) activities. (See Lynch v. Johnson, 420 F2d 818, 1970, 6th Circuit, which cites numerous other cases.) Another case in point is Ex parte Virginia, 100 US 339, 1879, which also stated that a state cannot disregard constitutional provisions in carrying out state functions, as well as finding a judge liable for his ministerial acts. At page 348, one finds, "We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from the obligations to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience." The central fact is that Judge Cole, with whom the court was dealing at that time, had no immunity because he was not performing a judicial act; his act (jury selection) being ministerial (although it certainly required a certain amount of discretion).

More recently, in Stump v. Sparkman, 38 CCH S. Ct. Bull. p. B1307, 1978, the Supreme Court of the United States dealt with this same issue, and placed the same limitation on judicial immunity. At page B1318 to B1321, the court held that ministerial acts were not protected. In a passage on page B1318, the first of these pages, the Court says, "It is only for acts performed in his 'judicial' capacity that a judge is absolutely immune, they say. We do not disagree with this statement of the law..." The Court also said, on the same page, (B1318), "This Court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act..." The U.S. Supreme Court goes on to state it's definition of a judicial act as follows, "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., <u>whether it is a funtion normally performed by a judge</u>..." (page B1320, emphasis added). (Usually, in Michigan, costs are taxed by a clerk.) And the Court goes on, on page B1321, "because Judge Stump performed the type of act normally performed <u>only by judges</u> and because he did so in his capacity as a circuit court judge,

we find no merit (to the case)..." (emphasis added).

The U.S. Supreme Court, then, states that a ministerial act is not protected by immunity; and that a judicial act is one "normally performed only by judge". (Please note the word only.) MCLA 600.2455 states that costs "may be taxed by any of the judges or clerks". By statute, then, Michigan has defined the taxing of costs as a ministerial act, within the meaning of the definition laid down by the U.S. Supreme Court. This is an old principle of law in the State of Michigan. Below, the plaintiff traced the derivation of this principle back to a statute of 1871.

In Michigan, then, costs are not only (remember that word from Stump v. Sparkman, supra) taxed by judges. They are also taxed by clerks. (In fact, in Michigan, costs are almost never taxed by judges; almost always by clerks.)

And, there is a long line of Michigan decisions holding that taxing costs is a ministerial act. Abbott v. Mathews (under that 1871 statute mentioned above), 26 Mich 176, 1872, which states at page 177, "But courts have never spent their time in taxing bills of cost,

unless upon appeal from the taxation made by some ministerial officer. This business is nothing more than the exercise of a ministerial power, involving to some degree, the use of judgment and discretion, like that of auditing officers..." And, in People ex rel. Videto v. Board of Sup'rs Jackson Co., 31 Mich 116, 1875, the Supreme Court of Michigan again defined the taxation of costs as a ministerial act, and spoke directly to attorney's fees as costs (fees were allowed by statute in that case). Please recall that, as far back as 1871, at least, until today, we have the same statutory language in an unbroken chain, through constant legislative re-enactment.

Plaintiff is not aware of any case holding contrary to the view put forward above.

Yet, although there is no published case in which a judge was permitted to use judicial immunity to protect unconsitutional acts performed while in his ministerial, rather than his judicial, capacity, the complaint was dismissed on the pleadings (as to defendant STAIR). Which should not be done unless the plaintiff cannot recover on any theory. (See Madison v. Purdy, 410 F2d 99, 1969; and Robertson v. Johnston, 376 F2d 43, 1967.)

A FEDERAL COURT CANNOT IGNORE THE ESTABLISHED LINE OF STATE COURT DECISIONS.

Beginning with the case which is most in

point, plaintiff cites Manning v. Ketcham, 58 F2d 948, 1932, 6th Circuit, which was a judicial immunity case in which the appellate court held that immunity did not apply since the defendant judge did not have jurisdiction. In that case, this court held that a federal court will follow and accept as correct the decisions of the highest court of a state as to the powers and the extent of the jurisdiction of the courts of that state. See also, Trust Co. of Chicago v. Pennsylvania R. Co., 183 F2d 640, 1950, in which the 7th Circuit, at page 642, cited Manning with favor, and then went on to embellish upon it. Another case which is sharply in focus is Home Indemnity Co. of New York v. O'Brien, 104 F2d 413, 1939, in which the Sixth Circuit, on appeal from the Eastern District of Michigan, held that the highest court ruling, or even a state appeals court ruling is binding on the federal court, regardless of the date of the decision. Another holding of this circuit, in Preferred Acc. Ins. Co. v. Barker, 104 F2d 424, 1939, held that in the Sixth Circuit, where any principle of law not involving the constitution or laws of the United States has been settled in a state court, the federal courts sitting in that state will follow the state rule. Also in Fleenor v. Hammond, 116 F2d 982, 1941, the Sixth Circuit established that the Circuit Court of Appeals was required to accept the

decision of the Court of Appeals of Kentucky as declaratory of the law of that state. In Milan v. Kausch, 194 F2d 263, 1952, the Sixth Circuit Court of Appeals, from a case arising in the Eastern District of Michigan, Southern Division, upheld the lower court by holding that the federal court is bound by the decisions of the state courts adjudicating state statutes where no federal question is involved, and such court is not invested with jurisdiction to set aside or ignore the decision of the state court. The rule is so well established that most district courts are following it. Accordingly see Bailey v. Erie Railroad Co., 143 F Supp 351, 1956, an Ohio decision in the sixth circuit, which held that the trial court is bound by the decisions of the Supreme Court of Ohio in matters of state law and cannot over-rule them. The decision tells us that the doctrine includes appellate decisions of intermediate appeals courts in the state.

Other Circuits are using the same rule. See, from the 8th Circuit, Mattson v. Central Electric & Gas Co., 174 F2d 215, 1949; Guy v. Utrecht, Warden, 144 F2d 913, 1944. From the 4th Circuit, Abbott v. Railway Express Agency, 108 F2d 671, 1940; and Dayton &. Michigan R. Co. v.

Commissioner of Internal Revenue, 112 F2d 627, 1940. From the 3rd Circuit, Kerrigan's Estate v. Joseph E. Seagram &. Sons, 199 F2d 694, 1952; and Krause v. Greenbarg, 137 F2d 569, 1943. From the 7th Circuit, Mangol v. Metropolitan Life Ins. Co., 103 F2d 14, 1939 (which held that a rule established by a line of decisions in the state court is not reviewed by the federal courts, and is recognized until it clearly appears that it has been over-ruled by the court of last resort); from the 5th Circuit, Yates v. Gulf Oil Corp., 182 F2d 286, 1950; and from the 2nd Circuit, Kleeges v. Cohen, 146 F2d 641, 1945.

But, it is appropriate that the various circuits have established this rule, since the U.S. Supreme Court has held in West v. A. T. & T. Co., 311 US 233, 1940, in a case arising out of the 6th Circuit, that state court rulings must be adhered to by federal courts. See also Albertson v. Millard, Attorney General of Michigan; and published at 345 US 242, 1952. Also see Huddleston v. Dwyer, 322 US 232, 1944.

It appears that the decisions hold that 28 USC 1652 is enforced through Rule 81(e) of FRCP to induce many of these decisions.

And so, we find that the appellate court's ruling in People v. Cousino, supra, holding that STAIR violated COUSINO's constitutional rights is a mandate upon the trial court; and, further, that the long line of Michigan decisions, arising out of the highest court in Michigan, and holding that the taxation of costs is ministerial rather than judicial is in focus clearly in this case.

STAIR'S STATE COURT JURISDICTION.

STAIR had no state court jurisdiction. He used judicial authority but, had no jurisdiction. STAIR has alleged, himself, on the record, that he is biased against appellant. The bias of STAIR was such that his handling of the appeal was void; since he had no jurisdiction. (See In re Hudson, 301 Mich 77, 1942; Horton v. Howard, 79 Mich 642, 1890; and Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich 127, 1915.) In a word, the judicial seat was vacant.

If STAIR lacked jurisdiction, he lacked immunity. (See Stump v. Sparkman, supra; and Manning v. Ketchum, supra.)

However, as we have seen above, even if he had jurisdiction, since his act was a ministerial one, he lacked immunity.

APPLICATION OF JUDICIAL IMMUNITY TO GOVERNMENT ATTORNEYS (PROSECUTORIAL IMMUNITY).

If we assume for a moment that immunity is applicable for defendant STAIR; let us comment further upon immunity as applicable to Government Attorneys such as McGRAIL. CJS Civil Rights, section 139 speaks to this point. "General statements have been made to the effect that government attorneys and their deputies and assistants are immune from liability for damages under the Civil Rights Act of 1871; the term 'Government attorneys' being used to signify attorneys general, United States attorneys, state attorneys, district attorneys, prosecuting attorneys, and attorneys for municipalities, whether city, county, or town." (This category includes McGRAIL.)

The cited section of CJS goes on. "The immunity of government attorneys from liablity under the Civil Rights Act of 1871 is limited, rather than absolute, and they are not immune simply as a matter of status, and wholly without regard to the nature of their conduct. Whether there is or is not immunity depends on the circumstances which are ultimately shown to exist, and to determine the applicable standard

of immunity, the court must examine the act attributed to the attorney rather than looking to the position or title he holds." Remember that, this act was later held, by the Michigan Court of Appeals, to be an unconstitutional deprivation of federally secured rights; and a careful reading of People v. Cousino, supra, indicates that the Court held that there was no statutory authorization. "The power to tax costs is wholly statutory. *** We...reverse the decision of the trial court."

The CJS section goes on; "The generally recognized rule is that a government attorney is immune from liability under the Civil Rights Act for acts done in his official capacity or in the performance of official duties, and as a quasi judicial officer he enjoys immunity in so far as his prosecuting functions are concerned; he is considered to enjoy the same immunity as that which protects a judge who acts within his jurisdiction over parties and litigation. It has also been stated that a government attorney possesses the same immunity in an action seeking to hold him personally liable for official acts under the Civil Rights Act as he does in a similar action for malicious prosecution.

But, section 139 goes on; "A government attorney is immune from liability under the statute for acts performed in connection with his quasi-judicial duties, and is immune where the acts were within the scope of his authority and jurisdiction, and were authorized by law. His immunity from liability under the Civil Rights Act for acts performed in a judicial or quasi-judicial capacity is based on considerations of public policy, and it is intended to accord government attorneys the same freedom and independence of action as that accorded the judiciary." (That is, a government attorney is only immune if his actions are authorized by law; and, as was already mentioned, the Court of Appeals in Michigan has held that McGRAIL's actions were not authorized by law.)

Remembering that there is no statute authorizing a prosecuting attorney to try to secure taxation of costs in a criminal matter - and especially not attorney's fees as costs - he was acting outside of his capacity; and without authorization of law. CJS goes on, "When a government attorney acts in some capacity other than in his quasi-judicial capacity, the reason for his immunity - integral relationship between his acts and the judicial process - ceases to exist, and if he acts outside

the scope of his jurisdiction and without authorization of law, he cannot shelter himself from liability under the Civil Rights Act by the plea that he is acting under color of office. Where the acts of a government attorney are committed pursuant to the performance of investigatory duties his role is substantially the same as that of a law enforcement officer, and no other immunity exists."

So McGRAIL is protected when prosecuting, but not when taxing costs - unless a statute allows such taxation. It is important to differentiate here between prosecution and taxation of costs. It is important to note that the constitutional violation was not authorized by law. And, it is important to note that, when taxing costs, McGRAIL acted in the capacity as a court clerk.

What does all this mean? The Courts have spoken. In Littleton v. Berbling, 468 F2d 389, 1972, 7th Circuit, cert. denied 414 US 1143, a careful reading of the case leads one to conclude that there is no immunity from civil liability by title of office unless the government attorney can point to a statute authorizing him to take action. McGRAIL cannot point to a statute authorizing him to tax attorney's fees as costs in a criminal case. This is true even if the judge is immune (See page 410 of Littleton); and at page 412 the case discusses liability

for injunctive relief. (Remember that there is no injunction sought here against criminal prosecution. An injunction is sought against violation of civil rights.) It must be kept in mind that McGRAIL has violated the law, not functioned under it; and has illegally sought to tax costs, participated in the taxation of costs, and benefited from such taxation. He has attempted to deprive the right to appeal. If he is successful at that at any future time; the result would be an irreparable injury.

See also Lewis v. Brautigam, 222 F2d 124, 1955, 5th Circuit, which also held that the government attorney, to be immune, must be able to point to a statute. In this case, which is strikingly similar to the within case, the state's attorney got others to try to prevent a criminal defense by attepted intimidation and threats and promises of rewards. (Strikingly like the within case, in which the prosecutor threatened costs and promised not to tax those costs which had been awarded if the appeal was taken no further.) The prosecutor, in both cases (Lewis and the within) was upset by a plea of not guilty. The only difference was that in the within case the prosecutor was

attempting to prevent the case from being heard in lower court. In Lewis, the government attorney was sued for $150,000, and the Court of Appeals held that the state's attorney was liable under color of his office but was not authorized by law, and hence was not immune. In this strikingly similar case, the government attorney, just as in the within case, filed a petition he knew to be contrary to law; for the purpose of circumventing the statute. Such a striking similarity. Since it is so well known that attorney fee's cannot be taxed as costs in a criminal appeal, the only way in which McGRAIL can demonstrate that he did not file a petition he knew to be contrary to law is if McGRAIL can demonstrate that he is totally incompetent and incapable of adequately practicing law in the State of Michigan.

But, the lesson to be learned from all this is that, to be immune, McGRAIL must have authorization of law for his act, even if he is within his jurisdiction.

See also Holton v. Boman, 493 F2d 1176, 1974, 7th Circuit, which held that prosecuting attorney's are not immune when they act without authority of law; and, Schneider v. Shepherd, 192 Mich 82, 1916, which, at page 88 says that, on the subject of quasi-judicial immunity for prosecutors, it only applies when they have narrow statutory authorization.

So, if judicial immunity applies to STAIR, it most certainly does not apply to McGRAIL.

JUDICIAL IMMUNITY APPLIED TO INJUNCTIVE AND OTHER RELIEF.

The complaint sought, not only monetary damages, but, also: (1) That the Macomb County Circuit be ordered to rehear the appeal; and, (2) That an injunction issue to prevent McGRAIL from further tampering with plaintiff's constitutional rights.

Immunity protects from personal liability; but, does not protect from such other relief as is sought here.

The law on this point has been in a state of flux in recent years. It had been established, as early as 1969, that judicial immunity did not apply when injunctive relief was sought and that the federal courts had jurisdiction over a plea for injunctive relief. (See Conover v. Montemuro, 304 F Supp 259, 1969 (Penn., 3rd Circuit).) Then in 1970, the 6th Circuit held that an injunction was appropriate when a state court was chilling exercise of a federal right or punishing reliance upon a federal right. (See Honey v. Goodman, 432 F2d 333, 1970.)

Then the law changed dramatically with the Supreme Court decision in Younger v. Harris, 27 L Ed 2d 669, 1971, which held that a "good-faith" prosecution would not be impeded with a federal injunction if the only injury was a normal criminal prosecution. However, at page 674, the court specifically said that they "express no view" when "no prosecution (is) pending in state courts".

Younger was explained more fuly in Palaio v. Mc Auliffe, 466 F2d 1230, 1972 (5th Circuit) which refers to "special circumstances" which render an injunction proper. The fifth circuit also brought the instant matter into sharp relief by applying the injunction rule to traffic tickets in Callahan v. Sanders, 339 F Supp 814, 1971. (Younger was in Feb. of 1971, Callahan in Sept. of 1971.) Callahan, most in point, granted "injunctions entered against defendant Justices from hearing any pending or future traffic cases"; after the courts had held that there had been a constitutional violation involved in the hearing of such cases. The case held that, "Absent a judicial order, the Justices are free to return to their old ways"; specifically mentioning Younger as not acting as a bar to such an injunction. There is one difference between Callahan and the instatnt case; that difference

between them being a mitigating factor. The justices in Callahan were not learned in the law, were often uneducated, and had no skills in legal analysis - none of these mitigating factors appear in the instant case. The instant case deals with a judge who is deliberately defying established legal concepts because of malice and prejudice, and a prosecutor who is similarly motivated.

The Supreme Court again commented upon such injunctive relief in Gibson v. Berryhill, 411 US 564, 1973, a unanimous opinion in which the court held that it was proper to grant injunctive relief against a prejudiced forum which was hearing adjudicatory proceedings, even though state court proceedings were in progress. The Court, in Gibson, cited with favor its opinion in Mitchum v. Foster, 407 US 225, 1971, stating that both cases hold that injunctions against state court proceedings are allowed under the civil rights act. In Mitchum, which was also unanimous except for 2 justices who did not take part in the consideration of the case, the Supreme Court enjoined judicial and law enforcement proceedings, deciding that federal courts have such power.

However, up to that point the Court had always held that an injunction could only be granted under a Younger exception. But, in Huffman v. Pursue, Ltd., 420 US 592, 1975, a case arising out of Ohio, the Court held that one who has exhausted his state appellate remedies need not come under a Younger exception (page 608).

The foregoing must be read against the background in the within case. In the within case, state appellate proceedings have been exhausted without disqualification of the defendant judge or prosecutor. In the cases mentioned, the injunctions sought were against all prosecution in state court. Not so in the within case, where the plaintiff is willing to submit to state court trial; but, where the plaintiff does not want that trial by a prosecutor who flagrantly abuses the constitutional rights of the undersigned. Injunctive relief is clearly appropriate here to prevent further abuse of the rights of the undersigned.

Plaintiff's remedy at law is inadequate. The District Court dismissed a plea for a redress of the constitutional violation which occurred and which brought about this suit. Unless and until that finding is reversed upon appeal the plaintiff herein is left with no way of seeking compensation for grievous constitutional violations perpetrated by

the defendant (McGRAIL). With such a reversal, the path to justice will still be a long and arduous one, since the case has already been in litigation for years. At the present time, although a remedy exists to seek state court reversal of unconstitutional practices (a lengthy remedy - and time delay may result in hardship), no remedy exists to compensate the defendant, as he would be compensated in a non-immunity situation.

Plaintiff may suffer irreparable harm. In this instant case, for example, money that was borrowed to pay unconstitutional levies in state court was ultimately returned; but, to date, the plaintiff (as a result of immunity) has been unable to regain the interest paid upon that money (and such recovery will not take place unless the decision below is disturbed upon appeal).

Plaintiff's plight is a threatening one. Although no state court action is currently pending against him, the vindictive nature or the defendant (McGRAIL) has been shown to the Courts below. Dated June 11, 1980, the plaintiff filed a motion for summary judgment on the issue of liability. Attachments to

that document demonstrate that McGRAIL actively sought the unconstitutional award in state court. The Court's attention is particularly drawn to the affidavit among those attachments. Paragraph 16 of the affidavit states, "That, on or about June 14, 1975, in a hallway conversation between affiant and defendant McGRAIL; said defendant McGRAIL stated to affiant that he would not proceed with the taxation of actual attorney's fees as costs, if, in return, affiant would agree not to appeal the traffic ticket conviction further. Defendant McGRAIL then went on to say that, if further appeal was contemplated, he would vigorously seek such taxation and try to get as much as possible." It can further be stated that, dating back for several years, there has been considerable harassment of plaintiff and his ex-wife by the Friend of the Court; so much so that the plaintiff and his ex-wife jointly sought and obtained removal of the Friend of the Court from that case. It appears that STAIR may have been involved in the early part of this harassment. To what extent McGRAIL may have involved himself is unknown at the present time.

The issue is not moot. The death of the defendant's co-conspirator (STAIR) does not mean that McGRAIL's vindictive nature has been appeased or cured. It seems rediculous to claim that the death of one person will induce another person to mend his ways.

SUMMARY JUDGMENT FOR THE PLAINTIFF.

In order for the plaintiff to maintain his case, it is necessary for him to demonstrate the following things:

Under 42 USC 1983;

Color of law

Deprivation of a federally secured right

Under 42 USC 1985;

Deprivation of a federally secured right

Conspiracy

They shall be discussed in the preceeding order. The question of animus, which briefly became an issue in the lower court, will then be mentioned last.

COLOR OF LAW

42 USC 1983 and 18 USC 242 are sister statutes; both requiring color of law and deprivation of a federally secured right; however, 18 USC 242, the criminal statute,

requires malice as well. They have been referred to as sister statutes (United States v. Price, 383 US 787, footnote on page 794). However, since the word "willfully" appears in 18 USC 242, but not in 42 USC 1983, malice or specific intent need not be shown under 42 USC 1983 (see Bell v. Hosse, 31 F2d 181). With that groundwork laid, reference is made to United States v. Barr, 295 F Supp 889, 1969, which was under the criminal statute, and in which it was held that non-officials who allegedly caused default judgments to be entered in state courts against specified inhabitants of the United States by signing affidavits of service of a summons and complaint when in fact they had not served such process upon inhabitants were acting "under color of state law" for purposes of the statute regarding deprivation of rights under color of law.

Further elaboration upon this point is contained in United States v. Price, et al, 385 US 787, 1966 (again under 18 USC 242), in which the Supreme Court held that non-officials who invoked the authority of those who were clothed with State authority were responsible under the statute. The decision reads in part, "Section 242 applies only where a person indicted has acted 'under

color' of law. Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Willful, of course, need not be shown under 42 USC 1983. But, a footnote on page 794 tells us the "under color of law" means the same thing in the two sister statutes.

In Picking v. Pennsylvania R., 151 F2d 242, it was held that color of law refers to being clothed with the authority of the state, as is a judge.

Defendant STAIR (now deceased) acted under color of law. (MCLA 600.1455; Art6, section 19 of the Michigan Constitution.) Such state power, when misused, constitutes acting under color of law. "(M)isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of law'." (Mc Shane v. Moldovan, 171 F2d 1016, claims that this is a quote of U.S. v. Classic, et al, 313 US 299. Mc Shane, incidentally, arose out of a criminal trial in Michigan, and was decided by the 6th Circuit.) (See also, Thompson v. Baker, 135 F Supp 247, which dealt

with a justice of the peace; and Geach v. Moynahan; 207 F2d 714.)

It is clear that STAIR, a state officer, acted under color of law. McGRAIL acted under color of law, either as a state officer (city attorney or prosecutor), or by invoking the authority of the state, in the person of STAIR.

DEPRIVATION OF A FEDERALLY SECURED RIGHT

The Michigan Court of Appeals (People v. Cousino, 81 Mich App 416) has held that STAIR and McGRAIL "impermissibly threaten(ed) defendant's (COUSINO's) right to appeal"; that there was a constitutional right to appeal, and that their actions "constitute(d) an attempt to chill exercise of the right to appeal". Such a decision is binding upon the federal court (as has been shown elsewhere in this document under the heading of A FEDERAL COURT CANNOT IGNORE THE ESTABLISHED LINE OF STATE COURT DECISIONS). But, in the present instance, that conclusive decision of the State Court is not even necessary. The deprivation is demonstrable without reliance upon it.

The United States Constitution, Amendment 5, guarantees due process in criminal proceedings.

(A traffic ticket is a criminal proceeding.) The amendment is enforceable to the states through the 14th amendment (see North Carolina v. Pearce, 395 US 711, 1969.) The same decision held that a state trial court cannot punish an appeal (pg. 723 - 724). The Court said that, when referring to the right to appeal, "penalizing those who choose to exercise" constitutional rights "would be patently unconstitutional" ... And the very threat inherent in the existence of such a punitive policy would...serve to "chill the exercise of basic constitutional rights." The Court goes on, "the imposition of a penalty upon the defendant for having successfully pursued a statutory appeal or collateral remedy would be no less a violation of due process of law." And, further, "A court is without right to ... put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered." The Court adds, "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." The High Court cites numerous cases in support of this view and goes on to further state that such retaliation, or the apprehension of it, is a due process violation.

The same was held in Boykin v. Huff, 1941, 121 F2d 865; and the United States v. Fiore, 467 F2d 86, 1972 (on appeal, due process requires that the defendant be freed of apprehension of retaliatory motivation on the part of a sentencing judge). Also see Doyle v. U.S., 1966, 366 F2d 394, which held that the right of the defendant to due process does not terminate with the verdict and sentence in lower court, and his constitutional rights must be protected to the extent of providing sufficient appeal whenever under the law a judgment is appealable. Especially see pg 398 - 399 which discusses the right to appeal whenever a judgment is appealable. Also see U.S. ex rel Diblin v. Follette, 1969, 418 F2d 408, which said that a state cannot hinder the right to appeal.

See also Griffin v. Illinois, 1955, 351 US 12; Douglas v. California, 1963, 372 US 353; and Dowd, Warden v. U.S. ex rel Cook, 1951, 340 US 206 ("In this Court the State admits, as it must, that a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment.") See also Cochran v. Kansas, 316 US 255, 1942, which held that a State official cannot attempt to suppress an appeal afforded to others as this would constitute a violation of the Fourteenth Amendment.

See also People v. Payne, 1971, 386 Mich 84, which held that due process and equal protection require that vindictiveness play no part in proceedings when a defendant attacks his conviction on appeal. Also, People v. McMiller, 1973, 389 Mich 425, which, at page 432 states that the court cannot discourage exercise of the right to appeal.

In fact, even if only state law were violated, the matter would be actionable herein. (See Monroe v. Pape, 365 US 167, 1960, which held that, concerning the civil rights laws, "It has been said that ... it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. ... But the history of the section... does not permit such a narrow interpretation." i.e., civil rights laws provide a remedy for violation of state law or constitution. In fact, in Monroe, it was held that under the civil rights laws, constitutional rights are deprived when an official can show no authority under state law, custom or usage, to do what he did.

And, in this case, we have much more than a violation of state law. The defendant's have violated the constitution of the U.S. and have been held, in court, to have done so.

DEPRIVATION UNDER 42 USC 1985

This element is the same under 42 USC 1985 as under 42 USC 1983; hence, see above.

CONSPIRACY

McGRAIL clearly invoked the authority of the state and acted in league and in concert with STAIR, actually going so far as to receive funds provided un-constitutionally by STAIR.

In Picking v. Pennsylvania, 5 FRD 76, 1946, it was held that "If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."

The Court goes on, "It is sufficient to allege that overt acts, in pursuance of the conspriacy, were done by certain of the conspirators, and itis not necessary to allege that every one of them committed an overt act; but it must be alleged that the conspirators not committing the acts either assisted therein or had knowledge thereof."

Under 42 USC 1985, then, conspiracy can be shown by showing assistance or knowledge of the actions of the other person; as long as two persons pursue the same object often by the same means. Co-operation is enough.

(See also Crawford v. City of Houston, Texas, 386 F Supp 187, 1974.)

Please note that it is no secret that those persons accused of traffic violations are discouraged by such persons as McGRAIL and STAIR from having their cases heard and from appealing from adverse decisions. Generally, traffic court "justice" is a joke.

MALICE

Although malice need not be shown (Bell v. Hosse, 31 FRD 181); nonetheless, it is the contention of the undersigned that malice was demonstrated by both STAIR and McGRAIL. The affidavit provided below gave additional information about the malice involved as well as the co-operation of these two defendants.

Other documents below bear clear indication of the preparation of McGRAIL. His preparation of such documents, in league with STAIR, document his involvement in this conspiracy. Such documents are on file below, as originals.

ANIMUS

In order to support the allegation of a class based animus, the undersigned reviewed 4 volumes of the Michigan Appeals Reports. The contention is that traffic court appeals are discouraged by any means possible to the prosecutor. For volume 93 (Oct. 15 to Nov. 20, 1979), there were a total of 94 cases reported. 39 of them were criminal cases, of which 3 were traffic related (one dealing with the possession and use of radar detectors and 2 DUILS).

For volume 92 (Aug 20 - Oct 15, 1979), there were 88 cases reported. 27 of them were criminal appeals, and none of those were traffic court appeals.

For volume 91 (June 20 - Aug. 20, 1979), there were 94 cases reported. 37 of them were criminal, and 2 of those were traffic related. (One dealt with a DUIL, the other with an emblem on a motor vehicle - and whether or not it could appear there.)

For volume 90 (May 1 - June 19, 1979) there were 94 cases reported. 32 of them were criminal and only one of them was traffic related (and that was a speeding case). This assumes one paternity case to be a criminal proceeding.

So, out of 370 cases, 135 of them were criminal. And out of that 135, only 6 were traffic related. And only 1 of those 6 was a speeding violation.

From reviewing the reporters, the following categories seem to predominate: murder, sex offenses, assault, drug crimes, and robberies of various sorts. And, the observer would conclude that the arrests in any one of those categories greatly outnumbered the number of traffic court violations. (If the defendant can provide data to show that this conclusion is accurate, the plaintiff will concede the issue of animus.)

CONCLUSION

A traffic court defendant attempted to appeal his traffic court conviction. At that time, Michigan law defined traffic court proceedings as criminal matters. The prosecutor did not want an appeal and was determined to do everything that he could to prevent it.

The case was assigned to the defendant's divorce judge, since it is the practice in Macomb County to keep the same person in front of the same judge in all cases. That judge was determined to deal harshly with such an appeal. He had much earlier acknowledged his prejudice against the defendant in the traffic court case, on the record. He had an additional grudge against the defendant because of a previous appeal which had been taken out of his court in that divorce. He was determined to "get" the defendant. Acting in concert, the prosecutor and the judge acted to chill the right to appeal. The Michigan Court of Appeals held that they did so. That defendant became the plaintiff here.

It is clear that the defendants violated COUSINO's constitutional rights while acting under color of law and as part of a conspiracy. Their only defense is immunity. Immunity is not available to the judicial defendant since he was performing a ministerial act. Immunity is not available to the prosecutor, since he can point to no statute that allows him to tax costs in a criminal matter, as he did.

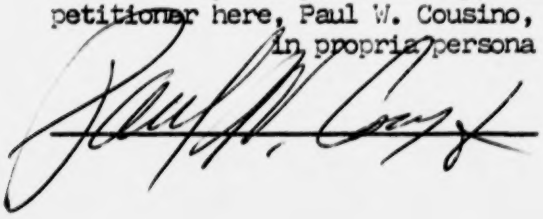
The tragedy is that this matter had to come this far in order for justice to be obtained.

The plaintiff humbly requests that this Court grant certiorari, so that the decision below can be reversed under the reasoning set forth in the foregoing. Ultimately, plaintiff-appellant requests this court to recognize the liability of the defendants and accept the merits of plaintiff's case.

Plaintiff seeks his costs herein.

It is hoped that this court will not approve of the actions of the defendants herein, who have been held to have violated and deprived the constitutional rights of the undersigned, who did so maliciously, and who have no immunity because the act complained of is a ministerial rather than a judicial one.

Submitted by the plaintiff-appellant, petitioner here, Paul W. Cousino, in propria persona



APPENDIX

* * *

PEOPLE v. COUSINO
265 N.W. 2d 355
81 Mich App 416

Proceeding in propria persona, defendant Paul W. Cousino appeals an order of Macomb Circuit Judge Hunter D. Stair June 14, 1976, affirming on appeal defendant's conviction of speeding and assessing costs of $350 for initiating a vexatious appeal.

Defendant was ticketed March 17, 1975, for driving 40 miles per hour in a 25 mile per hour zone in the City of Utica, County of Macomb. On March 21, 1975, he signed an appearance form, entering a plea of not guilty and requesting a trial on the charge.

The trial was held January 15, 1976, before visiting Judge Richard C. Stavoe, sitting in the 41st District Court. At the commencement of trial, defendant, representing himself in propria persona, moved to dismiss on two grounds: denial of the constitutional right to a speedy trial, and lack of jurisdiction on grounds the offense occurred in Sterling Heights rather than Utica. The motions were

denied and testimony was received from the ticketing officer, Utica City Police Officer Russell Wilson. Defendant neither cross-examined the officer nor testified in his own behalf. Following final argument by both sides, the court found defendant guilty and imposed a $25 fine, including costs.

Defendant appealed as of right to Macomb County Circuit Court, and filed a brief of twelve pages raising nine issues. The prosecution responed with a brief of nine pages.

In an opinion dated May 25, 1976, Macomb Circuit Judge Stair affirmed the conviction and ordered costs assessed against defendant pursuant to GCR 1963, 111.6, based on a finding that "this appeal was motivated solely by a vexatious and bad faith desire to harass legitimate judicial process". Judge Stair's final order, dated June 14, 1976, ordered defendant to pay costs to the Utica City Clerk in the sum of $350, which amount includes actual attorney fees billed by the Assistant City Attorney representing the City on appeal.

Pursuant to the order of this Court dated September 27, 1977, we limited the parties to the issue whether the trial court erred reversibly in ordering defendant to pay $350 costs, representing attorney fees for the City Attorney in defendant's appeal as of right from his District Court speeding conviction.

We address this issue alone.

The power to tax costs is wholly statutory. Gunderson v. Bingham Farms, 1 Mich App 647, 648, 137 N.W. 2d 763 (1965). Nonetheless, except as otherwise provided by statute, the Michigan Supreme Court may by rule regulate the taxation of costs. M.C.L.A. 600.2401; M.S.A. 27A.2401. The several statutes and court rules making provision for recovery of attorney fees as costs or damages under specified circumstances are collected in State Farm Mutual Automobile Insurance Co. v. Allen, 50 Mich App 71, 75, 212 N.W. 2d 821 (1973). Included are GCR 1963, 526.7, 116.5, and 117.3 (filing an affidavit opposing a motion for summary or accelerated judgment without good faith and for purposes of delay); GCR 1963, 111.6 (unwarranted allegations and denials in pleadings); and GCR 1963, 816.5 (vexatious proceedings in the Court of Appeals).

Judge Stair relied upon GCR 1963, 111.6, which reads as follows:

> "Unwarranted Allegations and Denials. If it appears at the trial that any fact alleged or denied by a pleading ought not to have been so alleged or denied and such

> fact if alleged is not proved or if denied is proved or admitted, the court may, if the allegation or denial is unreasonable, require the party making such allegation or denial to pay to the adverse party the reasonable expenses incurred in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees. GCR 1963, 111.6."

The historical derivation of this rule is explored in Harvey v. Lewis, 10 Mich App 23, 34–40, 158 N.W. 2d 809 (1958) (Levin, J., dissenting). See also 1 Henigman and Hawkins, Michigan Court Rules Annotated (2d ed.), 1975 Supp., pp. 52-53.

Our review of this matter convinces us that GCR 1963, 111.6, may not be employed against unsuccessful appellants in criminal cases exercising their constitutional appeal as of right. The trial court's assessment of costs in this case impermissibly threatens defendant's right to appeal. Because of this disposition of plaintiff's claim we need not consider what would have been in fact vexatious within the context of the actual pleadings in this case.

(v)

In short, we find the trial court's assessment of $350 costs against a defendant attempting to appeal his speeding ticket constitutes an attempt to chill exercise of the right to appeal guaranteed by 1963 Michigan Constitution, Art. 1, sec. 20. GCR 1963, 111.6, may not be extended to the lengths the trial court sought to reach in assessing these costs against defendant. No other provision appears in Michigan statutes or court rules to justify the measure proposed here, especially in view of defendant's constitutional right to appeal. We affirm defendant's conviction and reverse the decision of the trial court as to the award of costs and vacate the award of costs assessed.

* * *

ORDER

The motion of Paul W. Cousino, Plaintiff for entry of a Judgment of Default against Defendant, Hon. Hunter D. Stair, only, having been argued and submitted to the Court: and the Court having duly considered the motion and the response thereto, the arguments of counsel, both written and oral and good cause appearing on the record; THEREFORE,

IT IS ORDERED

1. That the motion for entry of a judgment of default is hereby denied, with prejudice and without leave to amend.

Hon Charles W. Joiner
United States District Judge

Dated: Sep 7, 1978

* * *

ORDER

The Motion of Hon. Hunter D. Stair, only to dismiss the action above-entitled for failure of the plaintiff to state a claim upon which relief can be granted against this defendant, only, having been argued and submitted to the Court: and the Court having duly considered the complaint on file herein, the arguments of respective counsel, both oral and written, and good cause appearing on the record; Therefore:

IT IS ORDERED

1. That the complaint of the plaintiff be and the same is hereby dismissed, without leave to file an amended complaint.

2. That the above-entitled action be and the same is hereby dismissed with prejudice.

Hon. Charles W. Joiner
United States District Judge

Dated: Sep 7, 1978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEFORE: LIVELY, ENGEL and KEITH, Circuit Judges

This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff seeks to appeal from an order of the District Court entered September 7, 1978, dismissing his pro se civil rights case as to one of the defendants named therein, Honorable Hunter D. Stair. It affirmatively appears, however, from the record in the District Court that this order appealed from is not a final appealable order under 28 U.S.C. sec. 1291 because it did not dispose of the entire litigation, in particular, Cousino's alleged cause of action against Assistant City Attorney William J. McGrail. Under such circumstances, this Court is clearly without jurisdiction over this appeal. William B. Tanner Company v. United States, 575 F2d 101 (6th Cir. 1978); Moody v. Kapica, 548 F2d 133 (6th Cir. 1976). Accordingly,

it is ORDERED that the appeal in the above entitled case is hereby dismissed.

MEMORANDUM OPINION AND ORDER

This is an action seeking injunctive relief, and monetary damages under 42 USC 1983 and 1985. Plaintiff herein alleges that his civil rights were violated by the Prosecuting Attorney for the City of Utica in seeking to have attorney fees taxed as costs in connection with plaintiff's appeal of his conviction for a traffic offense. Presently before the Court are plaintiff's motion and defendant's cross motion, for summary judgment.

Plaintiff was convicted of a traffic violation after a trial in the district court for the 41st Judicial District of Michigan. He then appealed his conviction to Macomb County Circuit Court, where it was affirmed. Defendant, as attorney for the City of Utica, represented the State on appeal. It appears that defendant submitted a motion, during the course of the appeal, for taxation of his attorney fees as costs. Plaintiff asserts that this action, taken in connection with defendant's offer, in private conversation with plaintiff, to forego the attorney fees, which were awarded, in exchange for plaintiff's agreement not to further pursue his appeal rights, constituted an attempt to deny or "chill" the exercise of those rights.

The fundamental issue at this juncture is whether defendant's actions were within the scope of his absolute prosecutorial immunity, i.e. whether they were "intimately associated with the judicial phase of the criminal process." Imbler v Pachtman, 424 US 409, 430 (1976). The Court concludes that they were. The actions in question, presenting a motion and attempting to plea bargain, do not extend beyond the traditional prosecutorial function of preparing and presenting the state's case, and clearly involve advocacy rather than administration or investigation. Cf., Humble v. Foreman, 563 F2d 780 (CA 5, 1977), reh denied, 566 F2d 106; Safeguard Mutual Insurance Co. v. Miller, 456 F Supp 682, 692-693 (ED Pa, 1978). Therefore, plaintiff's claim must be dismissed insofar as it seeks an award of money damages.

Plaintiff also seeks injunctive relief, however, and as to this aspact of the complaint, prosecutorial immunity has no relevance. Slavin v. Curry, 574 F2d 1256, 1264 (CA 5, 1978), reh denied 583 F2d 779.

Therefore, IT IS ORDERED that plaintiff's motion for summary judgment is DENIED, and defendant's motion for summary judgment is GRANTED in part.

IT IS SOR ORDERED

JAMES HARVEY
United States District Judge

Dec. 4, 1980

MEMORANDUM OPINION AND ORDER

This is an action brought pursuant to 42 USC 1983, wherein the plaintiff seeks injunctive relief against defendant, the City Attorney for the City of Utica, enjoining future violations of his civil rights. The Court has previously dismissed from this action claims against another defendant and a claim for damages against defendant McGrail.

Presently before the Court is a motion by defendant McGrail, seeking summary judgment. FR Civ P 56. The basis for the motion is that, based upon plaintiff Cousino's allegations and the uncontroverted affidavit of defendant McGrail, it is clear that injunctive relief cannot be had in this case.

As the Supreme Court has noted,

> The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. Beacon Theatres Inc v. Westover, 359 US 500, 506-507 (1959).

In order for a threat of irreparable harm to justify injunctive relief, the threat must be clear and actually impending; a threat that is merely speculative or apparent only through the eyes of an apprehensive plaintiff, will not warrant the exercise of this extraordinary equitable power. Bradly v. Detroit Board of Education, 577 F2d 1032, 1036 (CA 6, 1978);

Detroit Newspaper Publishers Assoc v. Detroit Typographical Union no. 18, International Typographical Union, 471 F2d 872 (CA 6, 1972), cert denied 411 US 967 (1973).

In the instant case the plaintiff has offered no substantial reason for his belief that future violations of his civil rights are imminent. This is particularly significant in light of defendant McGrail's affidavit averring that to this date he has prosecuted plaintiff Cousino only on the one occasion which gave rise to this suit, and is aware of no currently pending charges against plaintiff Cousino that could result in future prosecution.

Therefore, summary judgment is hereby GRANTED in favor of defendant William J. McGrail, Jr.

IT IS SO ORDERED.

JAMES HARVEY
United States District Judge

August 31, 1981

* * *

JUDGMENT

This action came on before the Court, the Honorable James Harvey, District Judge, presiding, and the issues having been duly considered and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and that the action be dismissed on the merits.

Dated this 14th day of September, 1981 in Bay City, Michigan

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BEFORE: LIVELY, Circuit Judge; and PHILLIPS and PECK, Senior Circuit Judges.

filed: Dec. 9, 1982

Cousino appeals from the district court's order dismissing his complaint for damages and injunctive relief. That appeal has been referred to this panel pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and the record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The district court dealt with every issue raised by the plaintiff-appellant in a series of orders which this court has examined. We find no error in any of the orders entered by the district court disposing of the claims of the plaintiff-appellant and conclude that this appeal is frivolous and entirely without merit. Rule 9(d)(2), Rules of the Sixth Circuit.

The judgment of the district court dismissing all claims is affirmed.

ENTERED BY ORDER OF THE COURT